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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 357

ROSENBERG BROS. & CO., INC., a corporation,
Petitioner,

vs.

COMMODITY CREDIT CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
Supplemental Brief of Petitioner

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To the Honorable Earl C. Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Brief for the respondent in Opposition raises certain points and characterizes certain legal principles in a manner which requires further comment from the Petitioner. It is the purpose of this Supplemental Brief to make such comment. This brief is filed in accordance with the provisions of Paragraph 4 of Rule 24 of the Supreme Court of the United States.

ARGUMENT

1. Respondent's Argument Emphasizes the Importance of the Question of Federal Law Which Should Be Settled by the Supreme Court.

Respondent's first argument (Brief, p. 8) characterizes the change in CCC's raisin purchase program as normally within the scope of the risks assumed by the Petitioner, implying that a government agency such as CCC "normally" has the right to interfere with performance of the parties with whom it contracts unless there is an affirmative showing that CCC has agreed to limit its activities. As has been pointed out in the Petition (p. 10) a contract not to hinder or prevent performance is "nearly always" implied, and it is "assumption of risk" by the other contracting party which must be affirmatively shown.

Respondent attempts to support its position by reference to *Title 15 USCA Section 714c* which grants CCC the power to support prices of agricultural commodities. Respondent characterizes this power as a "duty". It should be noted that raisins are a "non-basic commodity"; that the statute does not require CCC to support prices of non-basic commodities but only gives it discretion to do so; that under the terms of the statute, and of its Charter, CCC is also a purchasing agent of the United States. The nature of CCC's activities in the subject case emphasizes that it was acting principally in its role as a purchasing agent in connection with its 1947 raisin program. Speeches of the Secretary of Agriculture and of CCC officials, which preceded the call for bids, as well as the September 5 announcement, indicate the limited nature of the program and the aim of CCC to purchase only so many raisins as could be disposed of in designated outlets. Docket 0C-95a (Plaintiff's Exhibit 5) confirms this purpose. Contracts were made on the basis of

competitive bidding which produced low prices. CCC officials expressed themselves as delighted with the low prices obtained and refused to release packers from their contracts. Such "delight" and refusal to grant relief are certainly attributes of commercial purchase rather than of price support.

Respondent argues that the tentative nature of the statements contained in the September 5 announcement of the Secretary of Agriculture should have warned Rosenberg of the possibility of change (Respondent's Brief p. 11). Every statement to which Respondent refers indicates that CCC might purchase *less* than the maximum announced. None of the statements indicate that CCC would, in any event, *exceed* the announced maximum of 61,000 tons, or that CCC would enter into competition with packers to acquire raisins from growers or that CCC would support prices at any given level. The language of the announcement in these particulars is definite and unequivocal.

CCC's reliance on mere estimates of the raisin crop and of the raisin surplus do not support Respondent's argument that Rosenberg assumed the risk of change because of the tentative nature of the program. The estimates were carefully prepared and amazingly accurate. The original estimate of the surplus was 100,000 tons and CCC's announced program was to take only 61,000 tons of this surplus. The change in CCC's program was not the result of a change in surplus estimates. The surplus in actuality departed very little from the estimates. The expanded CCC purchase program aimed to acquire 121,000 tons, a figure actually in excess of the indicated surplus, whereas its original program indicated that a surplus of almost 40,000 tons would be left overhanging the market.

2. Respondent's Contentions Do Not Affect Petitioner's Argument That the Decision of the Court of Appeals Has Departed from the Decisions of the Other Circuits and from the Usual Course of Judicial Proceedings.

(a) MITIGATION OF DAMAGES.

Respondent argues that had Rosenberg stopped performance after CCC's purchase, it would have incurred no damage because it expected no profit on its CCC contracts. The principle of mitigation of damages on which Respondent relies is discussed in the commentary accompanying Section 336 of the Restatement of Contracts (cited by Respondent, Brief p. 13). Comment a indicates that an innocent contracting party need not incur unreasonable inconvenience or expense or disorganize his business in order to mitigate damages after a breach of contract. The innocent party should act only as a prudent man would. Respondent overlooks the fact that the large tonnage represented by Rosenberg's CCC contracts bore its share of Rosenberg's plant and overhead costs, and that the failure of Rosenberg to participate in CCC's program would have shifted all these costs to its commercial sales. It would have meant loss of grower confidence and contracts because of Rosenberg's inability to dispose of its growers' production, and this, in the long run, would have seriously interfered with Rosenberg's source of supply. It is also obvious that the failure of Rosenberg and of the nine other packers, which were in a similar position, to participate in CCC's program would have wrecked the program and brought disaster to the industry. When faced with these consequences, no prudent man could stop performance as Respondent suggests Rosenberg should have done.

In its discussion of the issue of mitigation of damages, Respondent ignores the established distinction between those cases where the party breaching a contract repudiates

the contract and those cases in which the defaulting party continues to insist on performance. None of the authorities cited by Respondent deal with the latter situation. *Warren v. Stoddart*, 105 U.S. 224, involves repudiation by the defaulting party. *Simon v. Good Year Metallic Rubber Shoe Co.* 105 F.2d 573 (C.A. 6) is not concerned with breach of contract, but is based on deceit and misrepresentation. *Board of Trustees v. O. D. Wilson Co.* 133 F.2d 399 (C.A. D.C.) does not involve breach of contract but deals with the unilateral mistake of a bidder in omitting an item from his bid, followed by performance.

Williston recognizes the distinction between a defaulting party who repudiates his contract and one who continues to insist on performance. He states:

> "The situation must not be confused with one where there has been a material breach of contract which does not, however, indicate any intention to renounce or repudiate the remainder of the contract. In such a case the injured party has a genuine election offered him of continuing performance or of ceasing to perform and any action indicating an intention to continue will operate as a conclusive choice, *not, indeed, depriving him of a right of action for the breach which has already taken place*, but depriving him of any excuse for ceasing performance on his own part. • • • but where the contract is totally renounced there can be no election between continuation and cessation of performance." 5 Williston Contracts (Rev. Ed.) § 1334, p. 3749. (Emphasis added.)

Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F.2d 488 (C.C.A. 10, 1930) does not, as Respondent claims (Brief p. 14), support Respondent's position, but is good authority for the proposition for which it was cited by Petitioner. On its facts, it is a repudiation case which holds that the innocent party may accept repudiation by the defaulting party to a contract

at any time before the repudiation is withdrawn. At page 492 of its opinion, the Court distinguishes cases such as the instant one stating:

> "The situation of the injured party where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party, where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a genuine election either of continuing performance or ceasing to perform. * * * On the other hand, where the contract is wholly renounced there can be no real election between continuation and cessation of performance * * * because, after notice of renunciation the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform".

(b) FAILURE TO FOLLOW FINDINGS.

Respondent attempts to explain the way in which the Court of Appeals disregarded the findings of the trial court by pointing out that under Rule 52(a) of the Federal Rules of Civil Procedure the trial judge's findings are conclusive only if not "clearly erroneous." In the instant case, the Court of Appeals simply ignored the findings of the District Court without comment. At no place in its opinion is there any statement which indicates that findings of the trial court were clearly erroneous. In view of the evidence in the record, it could not make such a finding.

3. The Decision of the Court of Appeals on the Question of Waiver Not Only Ignores the Findings of the Trial Court, but Is in Conflict with Another Decision in the Same Circuit.

Respondent's discussion of *United States v. Lundstrom* (D. Ore. 1941) 53 Fed. Supp. 709, *aff'd* (C.C.A. 9, 1943) 139 F.2d 792 (Respondent's Brief p. 14, footnote) is con-

fined to the Court of Appeals' opinion. The Petition refers to the District Court opinion, which is directly in point. Vouchers stating that payments received were "correct and just" were signed by the claimant as a condition of receiving progress payments, including a final payment, for moving lumber. The District Court stated that neither signing the vouchers nor acceptance of payment waived plaintiff's claim for damages for the additional expense occasioned by a variance in the nature of the materials hauled, distinguishing waiver of a "condition of a contract" from waiver of a "claim for damages". (53 Fed. Supp. at 711). Although the Court of Appeals, as Respondent states, did find that the defense of accord and satisfaction had not been properly presented by the Government, it also stated that the essentials of accord and satisfaction were not present (139 F.2d at 795), to that extent approving the District Court opinion.

The other authorities which Respondent cites on page 14 of its brief were either cases in which the claimant made deliveries in the absence of a contract or in excess of contract quantities, at a price stipulated as a condition of delivery, or cases where the Court found a waiver as a matter of fact. In the instant case, the District Court found as a matter of fact that there was no waiver. Moreover, the evidence shows that the contracting officer of CCC with whom Rosenberg made arrangements for delivery lacked authority to deal with price or to compromise Rosenberg's claim, and sought only to make arrangements for delivery and to effect a minor waiver of carrying charges and a minor adjustment for packaging (Record, pp. 617-618).

CONCLUSION

Respondent's Brief in Opposition fails to overcome the arguments advanced in the Petition for Certiorari. It is

respectfully submitted that each of the grounds stated in the Petition is valid, and that Certiorari should be granted so that the decision of the United States Court of Appeals for the Ninth Circuit may be reviewed and corrected by this Honorable Court.

Dated at San Francisco, California this 30th day of September, 1957.

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